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 Google Inc.

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN JOSE DIVISION

17 KINDERSTART.COM, LLC, a California
 limited liability company, on behalf of itself
 18 and all others similarly situated,

19 Plaintiffs,

20 v.

21 GOOGLE INC., a Delaware corporation,

22 Defendant.

CASE NO.: C 06-2057 JF (RS)

**DEFENDANT GOOGLE INC.'S
 OPPOSITION TO KINDERSTART'S
 MOTION FOR SANCTIONS
 PURSUANT TO RULE 11**

Before: Hon. Jeremy Fogel
 Date: January 19, 2007
 Time: 9:00 a.m.
 Courtroom: 3, 5th Floor

1 **I. INTRODUCTION**

2 In response to defendant Google Inc.'s ("Google") Rule 11 motion for sanctions, plaintiff
 3 KinderStart.com, LLC ("KinderStart") hastily served and then filed its own sanctions motion
 4 alleging that Google's motion violated Rule 11. Because Google's Rule 11 motion is
 5 meritorious, KinderStart's cross-motion necessarily fails. But even if Google's motion were
 6 unsuccessful, KinderStart has come nowhere near demonstrating that the motion violated
 7 Rule 11.

8 KinderStart offers one independent ground for its Rule 11 motion: the misguided
 9 assertion that Google violated Civil Local Rule 3-4(e) by citing to an unpublished opinion in
 10 briefing on Google's motions to dismiss and strike. KinderStart is wrong. Google's citation to
 11 the case, *SearchKing v. Google*, was entirely proper under the Local Rules.

12 Through its motion, KinderStart apparently hopes the Court will cast a pox on both
 13 parties, allowing KinderStart to escape sanction for its own misconduct. The unfounded motion
 14 should be denied and Google should be awarded the attorney's fees it incurred in opposing it.

15
 16 **II. BACKGROUND**

17 On October 20, 2006, Google filed a Rule 11 motion for sanctions against KinderStart
 18 based on allegations in KinderStart's Second Amended Complaint ("SAC") and noticed the
 19 motion for a hearing on December 8, 2006. Google's motion argued that the following
 20 allegations could not possibly have been the product of a reasonable investigation because they
 21 are simply untrue: (1) Google accepts payment in return for positions in its search results; (2)
 22 Google represents that it will provide a notification when it removes pages from its search results
 23 for any reason; (3) Google blocks webpages and reduces PageRanks for political and religious
 24 reasons. In opposition, KinderStart failed to proffer any *evidence* to support the contention that
 25 these allegations were the product of a competent investigation.

26 On November 16, 2006, KinderStart filed the present motion and noticed it for a hearing
 27 on January 19, 2007. On November 22, 2006, the Court continued the hearing on Google's
 28 Rule 11 motion to be heard with KinderStart's motion on January 19, 2007.

1 **III. ARGUMENT**

2 **A. Google's Rule 11 Motion is Meritorious.**

3 KinderStart's Rule 11 motion is premised mainly on the contention that Google's Rule 11
 4 motion is itself sanctionable. *See* Motion at 2-9. KinderStart argues that Google: (1) violated the
 5 safe harbor of Rule 11 when filing its motion; (2) should not have challenged KinderStart's
 6 allegations regarding paid placement by means of a Rule 11 motion; (3) improperly attacked
 7 KinderStart's misleading use of ellipses in connection with a Google statement regarding
 8 notifications on certain removals of search results; and (4) should not have based its Rule 11
 9 motion on KinderStart's allegations that Google engaged in political and religious
 10 discrimination. *Id.* Virtually all of KinderStart's motion appears to have been cut and pasted
 11 from its opposition to Google's Rule 11 motion. For the reasons set forth in Google's motion,
 12 reply memorandum and supporting declarations, Google's Rule 11 motion is meritorious.
 13 Accordingly, KinderStart's own Rule 11 request cannot possibly succeed.

14 In any event, KinderStart has in no way demonstrated with evidence, legal argument or
 15 case authority that Google's motion itself violates Rule 11. *See* Fed. R. Civ. P. 11(b) (setting
 16 forth the grounds on which a Rule 11 motion may be brought). KinderStart appears to presume
 17 that if Google's motion is not successful, then the motion necessarily violates Rule 11. Such a
 18 presumption is at odds with the text of Rule 11 which allows sanctions only upon a showing that
 19 Google acted with an improper purpose, advanced unwarranted legal contentions or lacked
 20 evidentiary support for its assertions. *See id.; Dong v. Applied Fusion, Inc.*, No. C 03-03698,
 21 2005 WL 1514118, at *12 (N.D. Cal. June 22, 2005) (sanctions not warranted for non-frivolous
 22 claims that were ultimately unsuccessful). But Google had no improper purpose in filing its
 23 Rule 11 motion, its legal contentions were well grounded and its factual assertions are amply
 24 supported. KinderStart has offered nothing at all to show otherwise. To the extent that
 25 KinderStart's motion seeks sanctions based on Google's Rule 11 motion, it must be denied.

26 **B. Google Did Not Violate Civil Local Rule 3-4(e)**

27 As the sole independent ground for its Rule 11 motion, KinderStart claims that Google
 28 has violated the Local Rules by citing to an unpublished opinion in prior briefs. KinderStart

1 could not be more mistaken. Google's citation to *SearchKing v. Google Technology Inc.*, No.
 2 CIV-02-1457, 2003 WL 21464568 (W.D. Okla. May 27, 2003) unequivocally complies with
 3 Local Rule 3-4(e), which states in pertinent part only that:

4 Any order or opinion that is designated: "NOT FOR CITATION," pursuant to
 5 Civil L.R. 7-14 or pursuant to a similar rule of any other issuing court, may not be
 6 cited to this Court either in written submissions or oral argument except when
 relevant under the doctrines of the law of the case, res judicata, or collateral
 estoppel.

7 Because the *SearchKing* case issued from the Western District of Oklahoma, it was
 8 obviously not designated "Not for Citation" pursuant to this Court's Local Rule 7-14. Nor was
 9 the *SearchKing* case designated "Not for Citation" pursuant to a "similar rule" of the Western
 10 District of Oklahoma. KinderStart admits as much: "[the Western District of Oklahoma] does
 11 not have a rule for having an opinion or order designated as 'Not for Citation', which might be
 12 considered the equivalent of the L.R. 3-4(e)." Motion at 9. That is the end of the analysis.
 13 Google has not violated Local Rule 3-4(e).

14 If KinderStart means to suggest that parties may only cite to district court opinions that
 15 are reported in West's Federal Supplement or some other "official reporter," such an argument
 16 has no basis in the text of the Local Rule or the practice of this Court. *See Dennis v. Brown*, 361
 17 F. Supp. 2d 1124, 1131 (N.D. Cal. 2005) (considering an unpublished order from this district that
 18 was reported in an electronic database); *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d
 19 1195, 1202 n.12 (N.D. Cal. 2004) (citing to an unpublished order from this district for a legal
 20 proposition); *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d
 21 1181, 1192 (N.D. Cal. 2001) (citing to an unpublished order from the Southern District of New
 22 York regarding a novel issue of law). Indeed, KinderStart itself has cited numerous unpublished
 23 cases in its briefs in this case.¹ In fact, KinderStart cited an unpublished case when seeking
 24 judicial notice *in connection with the present motion*. *See* KinderStart's Request of Judicial

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 26 ¹ *See* Motion for Preliminary Injunction (Doc. No. 16) at 18 (citing unpublished case);
 27 Motion for Specified Discovery on Defamation and Libel (Doc. No. 29) at 5 (citing unpublished
 28 case); Opposition to Motion to Dismiss the SAC (Doc. No. 56) at 7 n.8, 20 n.20, 22, 26 n.23
 (citing unpublished cases); Opposition to Motion to Dismiss/Strike SAC (Doc. No. 58) at 3
 (citing unpublished case).

1 Notice (Doc. No. 69-3) at 3 (citing *Jenkel v. City and County of San Francisco*, No. 06-2593,
 2 2006 WL 2053502 (N.D. Cal. July 21, 2006)). Moreover, KinderStart has not complained about
 3 the other unpublished opinions Google has referenced in its briefs, suggesting that KinderStart is
 4 troubled by the specific content of the *SearchKing* opinion and not by the citation to unpublished
 5 cases in general.

6 KinderStart's citation to *Google, Inc. v. Microsoft Corp.*, 415 F. Supp. 2d 1018, 1021 n.3
 7 (N.D. Cal. 2005) only confirms that citation to unpublished opinions is permissible under the
 8 Local Rules so long as they are not designated "Not for Citation." In that case, the Court ruled
 9 that a party's citation to an unpublished decision that had not been designated "Not for Citation"
 10 complied with Local Rule 3-4(e).² Ironically, the *Google v. Microsoft* court relied upon that
 11 very unpublished opinion when reaching its conclusion on the substantive issue before the court.
 12 In short, parties may cite to cases published in electronic databases if those cases have not been
 13 designated under Local Rule 7-14. *See Anderson v. Schwartz*, No. C06-2481, 2006 WL
 14 2472210, at *7 n.2 (N.D. Cal. Aug. 24, 2006) (party did not violate Local Rule 3-4(e) by citing
 15 to a case that had not been designated "Not for Citation"). KinderStart's Rule 11 motion based
 16 on Google's alleged violation of Local Rule 3-4(e) is simply frivolous.

17 **C. Google Should Be Awarded its Attorney's Fees**

18 Pursuant to Rule 11, "the court may award to the party prevailing on the motion the
 19 reasonable expenses and attorney's fees incurred in presenting or opposing the motion." Fed. R.
 20 Civ. P. 11(c)(1)(A). Here, given the baseless nature of KinderStart's Rule 11 motion, an award
 21 of attorney's fees and costs is appropriate. *See Advisory Committee Notes to 1993 Amendments*
 22 (noting that "the court may award to the person who prevails on a motion under Rule 11 –
 23 whether the movant or the target of the motion – reasonable expenses, including attorney's fees,
 24 incurred in presenting or opposing the motion"); *Patelco Credit Union v. Sahni*, 262 F.3d 897,

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 26 ² The fact that Google was a party to that case is of no moment. Google had different
 27 counsel in that action who mistakenly alleged in a footnote of an opposition brief that the adverse
 28 party had violated Local Rule 3-4(e). *See Case No. 05-03095, Docket No. 24 at 15 n.13.* The
 Court obviously disagreed that the Local Rule had been violated and Google does not contend in
 this case that citation to an unpublished opinion constitutes a violation of the Local Rule.

1 913 (9th Cir. 2001) (affirming award of attorney's fees to party defending against a Rule 11
 2 motion); *Vedatech, Inc. v. St. Paul Fire & Marine Ins. Co.*, Nos. 04-1249, 04-1818, 04-1403,
 3 2005 WL 1513130, at *16 (N.D. Cal. June 22, 2005) (awarding attorney's fees in the amount of
 4 \$15,000 to the target of an unnecessary and unsuccessful Rule 11 motion); *Harara v.*
 5 *ConocoPhillips Co.*, No. 04-0515, 2005 WL 240773, at *1-2 (N.D. Cal. Jan. 27, 2005) (granting
 6 attorney's fees to target of Rule 11 motion where the motion did "little more than restate the
 7 arguments in his motion to dismiss").³

8 **IV. CONCLUSION**

9 Google respectfully requests that the Court deny KinderStart's Rule 11 motion and award
 10 Google its fees and costs incurred in responding to it.

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 12 Dated: December 21, 2006

WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation

13
 14 By: /s/ David H. Kramer
 David H. Kramer

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 16 Attorneys for Defendant
 Google Inc.

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 26
 27 ³ The Ninth Circuit has explained that "[a] party defending a Rule 11 motion need not
 28 comply with the separate document and safe harbor provisions when counter-requesting
 sanctions." *Patelco*, 262 F.3d at 913.